IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 154

RONALD JAMES, *et al.*,

Appellants,

—v.—

ANITA VALTIERRA, *et al.*,

Appellees.

No. 226

VIRGINIA C. SHAFFER,

Appellant,

—v.—

ANITA VALTIERRA, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND THE NATIONAL OFFICE FOR THE RIGHTS OF THE INDIGENT

JACK GREENBERG
JAMES M. NABRIT, III
MICHAEL DAVIDSON
JEFFRY A. MINTZ
10 Columbus Circle, Suite 2030
New York, New York 10019

Attorneys for the NAACP Legal Defense and Educational Fund, Inc. and the National Office for the Rights of the Indigent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 154

RONALD JAMES, *et al.*,

Appellants,

—v.—

ANITA VALTIERRA, *et al.*,

Appellees.

No. 226

VIRGINIA C. SHAFFER,

Appellant,

—v.—

ANITA VALTIERRA, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND STATEMENT OF INTEREST OF THE *AMICI*

Movants NAACP Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent respectfully move the Court for permission to file the attached brief *amici curiae*, for the following reasons. The reasons assigned also disclose the interest of the *amici*.

(1) Movant NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Negroes to secure their constitutional

rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid gratuitously to Negroes suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf. The charter was approved by a New York court, authorizing the organization to serve as a legal aid society. The NAACP Legal Defense and Educational Fund, Inc. (LDF), is independent of other organizations and is supported by contributions from the public. For many years its attorneys have represented parties in this Court and the lower courts, and it has participated as *amicus curiae* in this Court and other courts, in cases involving many facets of the law.

(2) A central purpose of the Fund is the legal eradication of practices in our society that bear with discriminatory harshness upon Negroes and upon the poor, deprived, and friendless, who too often are Negroes. In order more effectively to achieve this purpose, the LDF in 1965 established as a separate corporation movant National Office for the Rights of the Indigent (NORI). This organization, whose income is provided initially by a grant from the Ford Foundation, has among its objectives the provision of legal representation to the poor in individual cases and the presentation to appellate courts of arguments for changes and developments in legal doctrine which unjustly affect the poor. Thus NORI is engaging in legal research and litigation (by providing counsel for parties, as *amicus curiae*, or co-counsel with legal aid organizations) in cases in which rules of law may be established or interpreted to provide greater protection for the indigent.

(3) In carrying out this program to establish the legal rights of Negroes and of the poor, LDF and NORI attorneys have handled numerous cases involving public and private housing, particularly ones challenging the denial of housing opportunities to those groups as a result of both

private and public discriminatory conduct. E.g., *Thorpe* v. *Housing Authority*, 386 U.S. 670 (public housing); *Williams* v. *Schaffer*, 385 U.S. 1037 (summary eviction of indigent tenant); *Triangle Improvement Council* v. *Ritchie*, —— F.2d —— (4th Cir. No. 14033, May 14, 1970, *reh. denied*, July 14, 1970) *pet. for cert. pending*, O.T. 1970, No. 712 (displacement of poor blacks by federally assisted highway); *Ranjel* v. *City of Lansing*, 417 F.2d 321 (6th Cir. 1969), *cert. denied*, 25 L.Ed.2d 390 (referendum denying zoning change to permit low cost housing); *Arrington* v. *City of Fairfield*, 414 F.2d 687 (5th Cir. 1969) (displacement of poor blacks by publicly aided construction); *Kennedy Park Homes Association* v. *City of Lackawanna*, —— F. Supp. —— (W.D.N.Y. August 13, 1970), appeal pending, No. 35320, 2d Cir. (refusal by city to permit development of low cost, black owned subdivision); *Western Addition Community Organization* v. *Weaver*, 294 F. Supp. 433 (N.D. Cal. 1968) (Urban renewal).

(4) It has become increasingly clear in recent years, if it was not so before, that the denial of opportunities for decent housing to the poor and particularly to members of minority groups is a major contributing factor to social unrest, see REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (KERNER COMMISSION) 266-274; 467-482 (Bantam Ed. 1968), and that it has a multiplier effect in restricting the availability of educational, employment and other opportunities. It is likewise manifest that the private sector of the economy is unable to meet the needs of the poor for housing, and that the public sector has woefully failed to meet even the goals set in legislation. 42 U.S.C. §§1401, 1441; 12 U.S.C. §1701(t); BUILDING THE AMERICAN CITY, REPORT OF THE NATIONAL COMMISSION ON URBAN PROBLEMS (DOUGLAS COMMISSION), *passim*. Part of the reason for this failure is found in local requirements, such as the provision of the California Constitution chal-

lenged in this case, which set up barriers to the construction of low cost housing. Perhaps reflecting "the self-righteous opposition often expressed toward subsidized housing for the poor," *id.* at 66, these requirements place burdens on the efforts of the poor to obtain decent housing which do not exist for those who are able to afford the cost of private housing. Article 34 of the California Constitution is particularly onerous, and has contributed to the fact that California has a much lower per capita availabilty of public housing than other comparable states.

(5) The *amici* believe that the attached brief will assist the Court by placing the California provision at issue here in a national perspective. We submit that it helps demonstrate that restrictions such as this have a racially discriminatory effect, which works to undo much of what this Court and the Congress have done to guarantee equal rights and equal opportunity.

(6) The individual appellees and the appellee Housing Authority of San Jose have consented to the filing of this brief *amici curiae*. This motion is filed because counsel for each of the appellants has refused consent.

WHEREFORE, movants pray that the attached brief *amici curiae* be permitted to be filed with the Court.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
MICHAEL DAVIDSON
JEFFRY A. MINTZ
10 Columbus Circle, Suite 2030
New York, New York 10019

Attorneys for the NAACP Legal Defense and Educational Fund, Inc. and the National Office for the Rights of the Indigent

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 154

RONALD JAMES, *et al.*,

Appellants,

—v.—

ANITA VALTIERRA, *et al.*,

Appellees.

No. 226

VIRGINIA C. SHAFFER,

Appellant,

—v.—

ANITA VALTIERRA, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF *AMICI CURIAE* OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND THE NATIONAL OFFICE FOR THE RIGHTS OF THE INDIGENT

Statement

This action challenges the validity, under federal constitutional standards, of Article 34 of the Constitution of

the State of California.[1] That provision requires that before any low rent housing project can be built in any municipality, the project must be approved by the voters of the "city, town or county" at a general or special election, specifically defining "low rent housing project" as one "financed in whole or in part" by federal or state subsidies, and further defining "persons of low income," those to be served by such projects, as those who, as determined by public housing authority standards, "lack the amount of income which is necessary . . . to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding." It became a part of the state constitution in 1950, as a result of a state-wide referendum, purportedly in response to the decision of the California Supreme Court in *Housing Authority* v. *Superior Court,* 35 Cal.2d 550, 219 P.2d 457 (1950), which held that decisions by a local housing authority to build public low-rent housing were administrative and not legislative decisions, and thus not subject to review by subsequent referendum, as, for example, would be an enactment by a city council.[2]

Two separate actions were filed in the district court—one by residents of the city of San Jose against the housing authority[3] and city council of that city,[4] as well as the

---

[1] The full text of Article 34 appears at pp. 2-4 of the brief of appellant Shaffer in No. 226, and at pp. 7-9 of the brief of appellants James, et al., in No. 154.

[2] As discussed in Part I of the argument, *infra,* Article 34 overshoots the possible need of filling the referendum gap created by that decision, in that it *requires* a *prior* referendum, rather than simply *authorizing* a *subsequent* one.

[3] The Housing Authority of San Jose has not appealed and appears in this Court as an appellee. It has filed a brief in support of the individual appellees, challenging the validity of Article 34.

[4] The Mayor and all but one member of the City Council of San Jose appear as appellants in No. 154. One member of the Council, Virginia C. Shaffer, is separately represented, and is the appellant in No. 226.

United States Department of Housing and Urban Development,[5] and one by residents of San Mateo County against the housing authority of that County.[6] The two cases were consolidated for all purposes by the district court, and are therefore joined in this appeal. The plaintiff-appellees are all poor persons who live in deteriorated housing in the two municipalities, and with few exceptions, they have been certified by the respective housing authorities as eligible for public housing. As a result of the shortage of public housing, which they contend is in large measure a result of the operation of Article 34,[7] they have not been placed in such housing.[8]

Ruling on motions for summary judgment filed by the plaintiffs in both actions, the three-judge district court held that Article 34 is invalid as a denial of equal protection, in that it constitutes an impermissible classification on the basis of wealth and further that, since the "low-income projects . . . will be predominantly occupied by Negroes or other minority groups" (App. p. 174), "the law's impact falls on minorities" (App. p. 175), creating a classification on the basis of race. *Valtierra* v. *Housing Authority of the City of San Jose*, 313 F. Supp. 1 (N.D. Cal. 1970) (App. pp. 168-179). This appeal, under 28 U.S.C. §1253, followed.

---

[5] The federal defendants were dismissed on their motion by the district court. App. pp. 171-2. That action is not questioned in this appeal.

[6] The San Mateo defendants chose to stand mute in the district court and do not appear in this appeal.

[7] In both areas, recent public housing proposals have been defeated in the referenda required by Article 34. App. pp. 28-29 (San Jose); App. pp. 118-121 (San Mateo).

[8] The affidavits of the plaintiffs, describing their present circumstance and their efforts to obtain public or other decent housing appear at App. pp. 14-20 (San Jose) and App. pp. 104-110 (San Mateo).

Summary of Argument

I

A. Article 34 on its face creates a classification on the basis of wealth. It requires the approval of the voters in a prior referendum before any subsidized housing for "persons of low income" can be built, but creates no such barrier to the housing needs of persons whose income enables them to purchase housing in the private market. Moreover, no other provision of California law imposes a similar obstacle on other than persons of low income, although various types of financial assistance are provided to assist the more affluent to obtain housing.

Article 34 serves no legitimate state interest. Assuming, *arguendo,* that the residents of a municipality have an interest in reviewing decisions which affect the development of their community, this interest could be satisfied by providing for *subsequent* referendum *review* of decisions to build public housing, initiated, when desired, by the opponents of the project, rather than *prior* referendum *approval,* which must be initiated in every case by its proponents. This would place public housing on a par with, for example, zoning changes which may benefit private housing for the wealthy, and which is subject to such review. Similarly, the state policy in favor of referenda and local democracy would be satisfied by providing for the possibility of subsequent review by the voters of public housing decisions.

The state policy requiring prior approval of legislative decisions which incur major long-term indebtedness is not relevant to public housing, as substantially all of the capital costs are met by federal subsidies. Article 34 also results in an impermissible distinction between federally subsidized public housing which benefits the poor and

housing assistance provided to the more wealthy, as well as other public projects which receive substantial federal assistance, such as highways, and which are not burdened even with the availability of subsequent popular review.

B. Even if there were some legitimate state interest served by Article 34, it is not a "compelling state interest" such as is required to justify a classification on the basis of wealth. This Court has held that "lines drawn on the basis of wealth or property . . . are traditionally disfavored." *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, 668 (1966). Where such classifications are found, a higher standard of justification is required than where typical, non-discriminatory state economic regulations are involved. Housing is a matter of vital importance to all and particularly to those who lack the income to obtain it in the private market. A burden placed on the availability of decent housing to the poor results in the deprivation of other fundamental rights, and thus has an effect beyond its immediate impact. No "compelling state interest" supports the burden on the poor which Article 34 creates.

II

A. While Article 34 on its face creates a classification only on the basis of wealth, it is well established that courts may look beyond to the actual effect of a challenged provision to determine its ultimate effect. The fact that an enactment is racially neutral does not bar a determination that its impact falls on minorities. The history of Article 34 strongly suggests a racially discriminatory motivation for its enactment. However, even in the absence of such motivation, the effect remains a relevant area of inquiry.

The record in this case demonstrates, and the opinion below, in harmony with decisions in similar cases, holds

that an enactment which discriminates against the poor has an inordinate impact on racial minorities, in this context, blacks and Mexican-Americans, because of the strong correlation between minority group status and poverty.

B. The racially discriminatory effect of Article 34 reinforces other discriminatory devices and serves to perpetuate segregation. It is particularly severe, because the denial of housing opportunities effectively restricts minority group members from access to other opportunities. Article 34 is an example of numerous public and private devices which promote discrimination in housing. The referendum procedure, highly desirable in most circumstances in a democracy, has frequently been misused for such purposes. In areas other than housing, subtle, facially neutral devices have been used commonly to discriminate against racial minorities, but have been invalidated by the courts. A like analysis applied to this case will reveal, as it did to the lower court, that Article 34 is discriminatory.

C. Since it has an inordinate impact on racial minorities, Article 34 is inherently suspect, and must overcome an extremely heavy burden of justification. No such showing exists here, for the reasons discussed in Part I, *supra*. Additionally, the fact that Article 34 was originally adopted by a state-wide majority vote and requires in its operation a decision by a local majority is irrelevant to its validity, since the majority may not act to limit the constitutional rights of minorities. Article 34 denies to racial minorities equal protection of the laws.

III

The direct effect of Article 34 of placing a special burden on the access of the poor to decent housing, and the incidental effect, resulting from the correlation between race and poverty, of restricting the availability of housing to racial minorities has a combined result of denying to many Negro Americans in California access to housing equal to that of whites. This result constitutes, as to them, the imposition of a badge or incident of slavery, prohibited by the Thirteenth Amendment, and constitutes a violation of the mandate of 42 U.S.C. § 1982, as interpreted by this Court in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

ARGUMENT

I.

Article 34 Enshrines in California's Constitution a Discrimination Based on Poverty In Violation of the Equal Protection Clause of the Fourteenth Amendment.

Article 34 establishes a formidable obstacle to the construction of federally aided public housing within the means of poor people, in the absence of any analogous provision with respect to other housing or to other federally aided public benefit programs. In so doing Article 34 operates arbitrarily, irrationally, and invidiously to deny poor people the equal protection of the laws.

A. *Article 34 Is Repugnant to the Equal Protection Clause Because It Imposes a Special Burden on the Poor That Is Not Rationally Related to Any Legitimate Governmental Objective.*

According to its own terms, Article 34 applies exclusively to low rent housing projects. It defines a low rent housing project as "any development composed of urban or rural dwellings, apartments, or other living accommodations *for persons of low income*", Calif. Const. Art. 34 §1 (emphasis added). By further definition, these are persons who "lack the amount of income which is necessary . . . to enable them, without financial assistance, to live in decent, safe, and sanitary dwellings, without overcrowding." *Ibid.* This language is explicit: it singles out for special governmental treatment only such housing as would benefit persons unable to provide adequate housing for themselves without public assistance.

On its face Article 34 openly differentiates between the poor and all other people. The impact of a restrictive classification falls on those who would benefit from the

programs hampered, cf. *Hunter* v. *Erickson*, 393 U.S. 385, 391 (1969). In this case low income persons stand primarily to benefit. Wealthy persons need little or no assistance in finding housing. Cf. *Hunter* v. *Erickson*, *supra* at 391, where this Court noted, "the majority needs no protection against discrimination." As appellant Shaffer somewhat misleadingly notes, "Directing legislation as to the problem of poverty is not classification on the basis of poverty." Brief of Appellant Shaffer in No. 226 at 44. But Article 34 is not a legislative enactment to deal with "the problem of poverty." It erects a barrier against legislative programs that provide for the housing needs of the poor.

The fact that California has, with limited exceptions, not yet chosen to provide public assistance for any housing other than low income housing[9] is irrelevant. California

---

[9] Even this analysis ignores the participation of Californians in federally-financed programs to assist moderate-income housing in the form of private homes, such as the Federal Housing Administration (FHA), Veteran's Administration (VA), and Federal National Mortgage Association (FNMA) programs.

Such programs have been of major importance in increasing the housing supply available to moderate and upper income groups. See, e.g., BUILDING THE AMERICAN CITY, REPORT OF THE NATIONAL COMMISSION ON URBAN PROBLEMS (THE DOUGLAS COMMISSION), at 66 (1968):

> The Nation has made a phenomenal record over the last two decades in building housing for the middle and affluent classes . . . Government policy has provided significant incentives and help through mortgage guarantees, secondary credit facilities, and Federal income tax deductions for interest payments and local property taxes. . . .
>
> The extent to which Government policy has subsidized the private homeowner is not generally recognized or acknowledged. . . . This generous but generally unacknowledged Federal subsidy to the affluent or middle-class homeowner needs to be emphasized in view of the self-righteous opposition often expressed toward subsidized housing for the poor. . . .
>
> In contrast to its truly amazing record in housing construction for the upper half of America's income groups, the Nation has made an inexcusably inadequate record in building

could legislatively decide to provide such assistance, without encountering any constitutional restrictions on its actions like those encumbering low income housing. The discrimination lies in the establishment of two different legislative processes: one, more arduous, for measures that would particularly benefit a disfavored minority group; and the other, more routine, for measures of benefit to the majority. Cf. *Hunter* v. *Erickson, supra* at 390; Black, *The Supreme Court 1966 Term, Foreward: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 75-76 (1967). Article 34 offends precisely because it singles out the poor with the effect and for the apparent purpose of reducing the already limited housing opportunities available to them. Article 34 lends the weight of constitutional restriction to all the other forces and handicaps that the poor must contend with in their efforts to achieve the minimum of human dignity.

We submit that the District Court below properly held Article 34 an "unequal imposition of burdens upon groups that are not rationally differentiable in light of any legitimate state legislative objective." Appendix, p. 173. An examination of the interests and objectives asserted by appellants should lead this Court to agree that the discrimination embodied in Article 34 is not rationally related to any of these interests.

Appellants contend in justification of Article 34 that it merely reasserts California's strong policy in favor of referenda and local democracy. This contention distorts

---

or upgrading housing for the poor to provide them with decent, standard housing at rents they can afford. [footnote omitted.]

Moderate and upper-income Californians participate in these programs on a vast scale. See REPORT ON HOUSING IN CALIFORNIA, *Governor's Advisory Commission on Housing in California* (1963), especially the Appendix. *California has imposed no legislative restrictions of any kind on participation in these federal programs.*

both the substance of California's referendum policy and the nature of Article 34, as a brief description of the Article's history will indicate. California's general constitutional reservation of referendum powers to the people secures the popular option "to so adopt or reject any Act, or section or part of any Act, passed by the Legislature," and extends to local review of local legislative actions. Calif. Const. Art. 4 § 1. Nothing in this language requires or permits the imposition of a *prior* referendum requirement. It simply reserves to the people the power to approve, alter, or amend legislative actions already taken.

With particular reference to local bond issues, appellants also assert that California policy requires prior approval of any local action incurring indebtedness, Brief of Appellant Shaffer in No. 226 at 33-34. This constitutional policy is allegedly embodied in Calif. Const Art 11 § 18, providing that no locality shall incur indebtedness or liability in excess of its annual revenue without voter approval Yet as the extensive discussion of Art 11 § 18 in *Westbrook* v. *Mihaly*, 2 Cal. 3d 765, 471 P.2d 487 (1970) indicates, this restriction is meant to apply only to actions requiring the locality itself to make expenditures and assume bonded debt.[10] It should not apply to programs under the Federal Housing Acts of 1937 and 1949, because there the federal agency guarantees and assumes the costs of housing

[10] Section 18 establishes "pay as you go" as "a cardinal rule of municipal finance," applicable to "projects necessitating long-term expenditures," *Westbrook* v. *Mihaly, supra* at 776-77, 471 P. 2d at 494. One case interpreting the purpose of the section found that it was to avoid a situation "whereby the holders of an issue of bonds could . . . force an unconsented-to increase in the taxes of, or foreclosure on the general assets and property of the issuing public corporation." *City of Redondo Beach* v. *Taxpayers, Property Owners, etc., City of Redondo Beach*, 54 Cal. 2d 126, 131, 325 P. 2d 170 (1960); *Westbrook* v. *Mihaly, supra* at 777 n. 16, 471 P. 2d at 494 n. 16.

development.[11] Under these programs the municipality is merely an intermediary between the funding agency and the bondholders. The programs involve no current expenditures or affirmative financial obligations for the municipality. They are in effect federal and state projects administered locally.

For this reason, the California Supreme Court in *Housing Authority* v. *Superior Court*, 35 Cal. 2d 550, 219 P.2d 457 (1950) held that such local housing authorities' acts were "executive and administrative" rather than "legislative," and therefore not subject to the referendum provisions of the California Constitution. *Id.* at 461, 462. Article 34 was enacted shortly after this decision, evidently in response to it. Appellant Shaffer now contends that Article 34 does no more than close the "loophole" left by the *Housing Authority* decision, Brief of Appellant Shaffer in No. 226 at 18, 33-34. This argument is unpersuasive on two grounds. First, there was in fact no "loophole," since as shown above the Art. 11 §18 prior referendum requirement was never intended to apply to this situation. Article 34 was in fact a substantially new enactment. Second, even if any loophole had existed, Article 34 does much more than "close the loophole" left by the decision. The *Housing Authority* case could have been overruled, had that been the sole object, by an amendment permitting *subsequent* referendum review of decisions to build low rent housing. But Article 34 went beyond such overruling of the decision to impose an additional requirement Cf. *Reitman* v. *Mulkey*, 387 U.S. 369, 376-377 (1967); Black, *The Supreme Court 1966 Term, Foreward: "State Action,"*

[11] The Federal government guarantees all such bonds issued and reimburses the local authority for payments on principal and interest. 42 U.S.C. §1409. There can thus be no possibility of impairment of the municipality's fiscal integrity by these bonds.

Equal Protection, and California's Proposition 14, supra, at 77. Article 34 requires the so called full measure of "local democracy" only for approval of the projects which affect the housing aspirations of the poor. Whereas a subsequent referendum requirement might arguably bring decisions to build public low rent housing into procedural conformity with all other legislative programs, the prior referendum requirement singles out programs which benefit the poor. Such a classification on grounds of poverty is irrational because poverty is unrelated to the objective of democracy, *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663 (1966), and therefore violates the Equal Protection Clause, *Rinaldi* v. *Yeager,* 384 U.S. 305, 309 (1966); *Skinner* v. *Oklahoma,* 316 U.S. 535, 542 (1942); *Carrington* v. *Rash,* 380 U.S. 89, 96 (1965).

Even if low cost housing projects did involve local expenditures (and therefore arguably fall within the scope of the California policy favoring prior referenda on long-term fiscal undertakings), Article 34 would be offensive to equal protection principles. Only low income housing is subject to its requirement. No similar burden is placed on other state legislative actions assisted by federal funds even where such projects, like low income housing, take property off local tax rolls.[12] As the Court below stated,

> The vice in this case is that Article XXXIV makes it more difficult for state agencies acting on behalf of the poor and the minorities to get federal assistance

[12] Appellant Shaffer professes not to see the "likeness in any rational aspect" between such projects and low-income housing. Brief of Appellant Shaffer in No. 226 at 46. Yet, to take but one example, federally-funded highway construction under the Federal-Aid Highway Act of 1956, as Amended, 23 U.S.C. §§101 et seq., also takes large tracts of local land off tax rolls and may impose heavy future obligations on the municipality by encouraging new residential, industrial, and commercial developments requiring utility improvements and municipal services.

> for housing than for state agencies acting on behalf of other groups to receive financial federal assistance. . . . Some common examples, *inter alia*, are: highways, urban renewal, hospitals, colleges and universities, secondary schools, law enforcement assistance, and model cities. (Appendix p. 177.)

It is irrational and impermissible to limit the application of the policy to low income housing, while all other projects which might involve similar local fiscal obligations are not so disfavored. A valid classification must be reasonable in light of its purpose, *McLaughlin* v. *Florida*, 379 U.S. 184, 191 (1964). This classification is eminently unreasonable and hence repugnant to the Equal Protection Clause.

The analogy between housing projects and the other federally assisted projects just mentioned also serves to discredit the "non-fiscal" justifications of the prior referendum requirement. These purported justifications are "sociological," "psychological," and aesthetic, see Brief of Appellant Shaffer in No. 226 at 19, 36-38. Yet highways, schools and renewal projects, like low income housing, involve displacement and relocation, affect housing patterns, and have substantial social consequences for the locality.[13] Nevertheless these programs are not equally subject to prior referendum approval. It would appear that the principal support for Article 34 derives less from concern for the sociological aspects of urban development, than from unwillingness to allow low rent housing residents into the locality.

We do not here contend that *any* referendum provisions, as for example the possibility of subsequent popular dis-

---

[13] Cf. *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F. 2d 920 (2nd Cir. 1968); *Triangle Improvement Council* v. *Ritchie*, —— F. 2d —— (4th Cir. No. 14033, May 14, 1970, reh. denied July 14, 1970), *pet. for cert. pending*, O.T. 1970 No. 712.

approval, is necessarily invalid. We do not attack "democracy" but only the discriminatory application of the referendum requirement. We submit that the poverty-based discrimination of Article 34 must be struck down as an arbitrary and invidious classification lacking any rational relationship to legitimate governmental ends. *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Harper* v. *Virginia State Board of Elections, supra; Griffin* v. *Illinois*, 351 U.S. 12 (1956).

B. *Even If There May Be Some Rational Justification For Article 34, This Justification Does Not Rise to the Level of a Compelling State Interest in the Measure. Absent Such an Interest, Article 34 Is Constitutionally Defective Under the Equal Protection Clause.*

Even if there were some rational relationship between Article 34's classification and a proper governmental goal, the Article would still violate the Equal Protection Clause. It certainly does not further any "compelling" or "overriding" state interest. Only such an interest should justify official wealth-based discriminations.

As this Court has held, "Lines drawn on the basis of wealth or property, like those of race [citation], are traditionally disfavored," *Harper* v. *Virginia State Board of Elections, supra, at* 668; *McDonald* v. *Board of Elections*, 394 U.S. 802 (1969). Consequently, this Court has in many instances involving wealth-related classifications declined to adhere to the equal protection standard traditionally applied in review of state economic or social regulations, *Lindsley* v. *National Carbonic Gas Co.*, 220 U.S. 61 (1911); *McGowan* v. *Maryland*, 366 U.S. 420 (1961). It should not apply any such traditional standard here.

When the discrimination cuts against the welfare of the poor, a more demanding standard comes into play, par-

ticularly when an important interest is thereby jeopardized. Thus, this Court in *Harper* v. *Virginia State Board of Elections, supra,* stated that "where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined," 383 U.S. at 670. See also *Shapiro* v. *Thompson, supra,* at 633, 638; cf. *Williams* v. *Rhodes,* 393 U.S. 23, 32 (1968). Judicial review in such cases requires that the State demonstrate a "compelling interest" in its scheme, for mere rationality or some conceivable justification will not suffice to offset the important interest of the individuals adversely affected by the classification. *Shapiro* v. *Thompson, supra,* at 638.

For example, in *Southern Alameda Spanish Speaking Organization* v. *City of Union City,* 424 F.2d 291 (9th Cir. 1970), the court found that the effect of a municipal zoning referendum was "to deny decent housing and an integrated environment to low income residents," 424 F.2d at 295. Observing that the municipality "may well" have an affirmative duty to deal with the housing needs of the poor, the court stated:

> Surely, if the environmental benefits of land use planning are to be enjoyed by a city and the quality of life of its residents is accordingly to be improved, the poor cannot be excluded from enjoyment of the benefits. Given the recognized importance of equal opportunities in housing, it may well be, as a matter of law, that it is the responsibility of a city and its planning officials to see that the city's plan as initiated or as it develops accommodates the needs of its low income families, who usually—if not always—are members of minority groups. 424 F.2d at 295-296. [footnotes omitted]

The court applied a much more rigorous standard of scrutiny than the traditional standard urged by appellants.[14]

Appellants' assertion that the case of *Dandridge* v. *Williams*, 397 U.S. 471 (1970) requires another standard is not well taken. That case fell squarely within the arena of economic measures as to which this Court has always allowed the states great latitude. *Dandridge* dealt with a state public welfare assistance program, and in particular with the "difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients," 397 U.S. 471, 25 L. Ed. 2d 491, 503 (1970). Here, the provision challenged does not significantly assist the state in regulating its finances. Article 34 restricts the development of housing that would not impose obligatory expenditures on the state or its subdivisions, but would be substantially financed by the federal government.[15]

Housing is a fundamental interest which must be protected from discriminatory state action not firmly grounded on a compelling state interest. This Court has long shown concern for the problems confronting those who are handicapped in their search for decent housing. *Buchanan* v. *Warley*, 245 U.S. 60 (1917); *Shelley* v. *Kraemer*, 334 U.S. 1 (1948); *Reitman* v. *Mulkey*, *supra*; *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Hunter* v. *Erickson*, *supra*.[16] As a result of discriminatory practices and laws

---

[14] Cf. *In re Appeal of Girsh*, —— Pa. ——, 263 A.2d 395 (1970), holding that a municipal zoning ordinance which made no provision for multiple-dwellings within the town was unconstitutional as it had the effect of totally excluding those who, for economic or other reasons, would prefer to live in apartments.

[15] See pp. 11-12, *supra*.

[16] Discriminatory deprivation of housing has also in recent years been the subject matter of a substantial and increasing volume of litigation before the lower federal courts. See, for example, *Nor-*

like Article 34, the housing crisis affects the poor as a group, as it also affects racial minorities.[17]

Congress has over a period of years repeatedly declared its concern for the inability of the poor to find adequate housing. The Housing Act of 1949 states:

> "The Congress declares that the general welfare and security of the Nation and the health and living standards of its people require . . . governmental assistance . . . to provide adequate housing for urban and rural non-farm families with incomes so low that they are not being decently housed in new or existing housing." 42 U.S.C. §1441.

In the Housing and Urban Development Act of 1968 Congress affirms the goal of §1441 but then finds "that this goal has not been fully realized for many of the Nation's lower income families; that this is a matter of grave national concern," 12 U.S.C. §1701(t). And by 42 U.S.C. §1401, first enacted in 1937, "It is declared to be the policy of the United States . . . to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income."

---

walk CORE v. *Norwalk Redevelopment Agency*, 395 F. 2d 920 (2nd Cir., 1968); *Southern Alameda Spanish Speaking Organization* v. *City of Union City*, 424 F. 2d 291 (9th Cir. 1970); *Ranjel* v. *City of Lansing*, 417 F. 2d 321 (6th Cir. 1969), *cert den.*, 397 U.S. 980 (1970); *Arrington* v. *City of Fairfield*, 414 F. 2d 687 (5th Cir. 1969); *Powelton Civic Home Owners Assn.* v. *HUD*, 284 F. Supp. 808 (E.D. Pa. 1968); *Kennedy Park Homes Assn.* v. *City of Lackawanna*, —— F. Supp. —— (W.D.N.Y. Aug. 13, 1970) (expedited appeal pending, No. 35320, 2nd Cir.); *Gautreaux* v. *Chicago Housing Authority*, 296 F. Supp. 907 (N.D. Ill. 1969); *Otey* v. *Common Council of Milwaukee*, 281 F. Supp. 264 (E.D. Wisc. 1968); *Holmes* v. *Leadbetter*, 294 F. Supp. 991 (E.D. Mich. 1968); *Western Addition Community Organization* v. *Weaver*, 294 F. Supp. 433 (N.D. Cal. 1968).

[17] The relationship of racial discrimination is more fully discussed in parts II and III of this Argument, *infra*.

Adequate housing within the means of poor people is also the key to enjoyment of other fundamental rights. The restriction of public housing programs, particularly when private low rent housing is disappearing through destruction, (often by governmental action[18]) and increasing costs,[19] excludes low income persons from local electoral participation, cf. *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960), and reduces the right to travel and to locate oneself freely, *Edwards* v. *California*, 314 U.S. 160 (1941), *Shapiro* v. *Thompson*, *supra*, to a limited right of passage. Freedom of "in-migration," including immediate availability of welfare support for indigents, is constitutionally protected, *Shapiro* v. *Thompson*, *supra*, at 631, but this freedom is hollow indeed where discriminatory local regulations effectively prevent indigents from finding housing in areas to which they wish to migrate. Access to equal educational opportunities, *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954), depends significantly on residence.[20] Access to housing is also essential to equal job opportunities for low income workers, particularly as the pattern of job dispersal into newer areas continues, if they are not to be prevented from following their jobs and freely competing for new ones. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (KERNER COMMISSION) 392-393 (Bantam Ed. 1968). If the poor are denied housing in the very

---

[18] "Furthermore, over the last decades, Government action through urban renewal, highway programs, demolitions on public housing sites, code enforcement, and other programs has destroyed more housing for the poor than government at all levels has built for them." BUILDING THE AMERICAN CITY, *supra*, at 67.

[19] See, e.g., Affidavit of Franklin Miles Lockfeld, App. pp. 59, 60-61.

[20] The discriminatory determination of educational opportunity by socio-economic patterns was a basis for detailed comment and a ground for the decision in *Hobson* v. *Hansen*, 269 F. Supp. 401, 513 (D.D.C. 1967), aff'd sub nom. *Smuck* v. *Hobson*, 408 F. 2d 175 (D.C. Cir. 1969).

areas of most vigorous economic and demographic growth, such as Santa Clara and San Mateo Counties, they will remain excluded from the benefits of economic growth.

The State's justification for its discrimination between low rent housing and all other housing projects, therefore, must reflect a "compelling state interest," *Shapiro* v. *Thompson, supra* at 634, 638. Where "less drastic means are available" to assure the governmental objective, "it is unreasonable to accomplish this objective by the blunderbuss method." *Id.* at 637. As discussed *supra*[21] the State's interest in Article 34 fails even to satisfy criteria of rationality or plausibility. California could have carried out its policy favoring referenda without placing a special burden on the poor, by *permitting* low income housing projects to be submitted to *subsequent* referendum. Instead California chose to encumber low income housing with the special onerous requirement of *prior* referendum approval. As against the vital constitutional interest in protecting the poor minority against injury from unequal treatment with regard to its most important interests, the State's alleged justifications for Article 34 merit no greater deference than was accorded to them by the Court below. The District Court's summary dismissal of these justifications was proper, and its holding that Article 34 violates the Equal Protection clause was correct.

---

[21] Pp. 10-14.

II.

Article 34 Establishes an Official Racial Classification Which Is Arbitrary, Invidious, Discriminatory, and Violative of the Equal Protection Clause of the Fourteenth Amendment.

Article 34 effectively classifies people on a racial basis for different governmental treatment, even though the words of the Article are not explicitly racial. This violates the right of the racial minority to the equal protection of the laws.

A. *The Scheme of Article 34 Sets up an Official Classification Which Unequally Affects Different Racial Groups.*

The case at bar closely resembles *Hunter* v. *Erickson*, 393 U.S. 385 (1969), in which this Court invalidated an amendment to the Akron, Ohio, City Charter requiring prior referendum approval for any local legislative action relating to discrimination in housing. The present case is indistinguishable from *Hunter* but for the fact that by its terms, the discrimination is based on wealth rather than on race, religion, or ancestry. However, the racially discriminatory effect of Article 34 can be clearly demonstrated by examining its impact.

This Court in *Hunter* expressly looked behind the Charter amendment's terms to weigh its inevitable effect:

> . . . although the law on its face treats Negro and white, Jew and gentile, in an identical manner, *the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination* and if it did, a referendum might be bothersome but no more than that. . . . §137 places special burdens

> on racial minorities within the governmental process. 393 U.S. at 391. (emphasis added)

The court below relied on the quoted passage in finding that "here, as in the *Hunter* case, the impact of the law falls upon minorities." Appendix pp. 175, 176. Article 34, like the *Hunter* measure, is neutral on its face with regard to race. But here as in the previous case it is principally one group—the racial minority—which actually feels the burden of the measure. *Hunter* commands the invalidation of an enactment which has racially discriminatory effects, without requiring a showing of discriminatory motivation for the enactment. We submit that this Court should affirm the District Court's proper application of that recently announced constitutional mandate.

Neither this Court nor California itself is a stranger to attempts to cloak discriminatory legislation in superficially neutral terms. In *Reitman* v. *Mulkey,* 387 U.S. 369 (1967), this Court found both discriminatory purpose and effect, and held the state constitution's guarantee of the freedom to sell property invalid as a substantial state involvement in private discrimination. 387 U.S. at 378. The message of *Reitman* is clear: superficially non-discriminatory statutory language will be disregarded where the full facts indicate that the statute visits hardship on a racial minority. Cf. *Yick Wo* v. *Hopkins,* 118 U.S. 357, 374 (1886).

As a California constitutional amendment adopted by initiative and limiting equal housing opportunities, Proposition 10—the electoral version of Article 34—strongly resembles Proposition 14, the measure invalidated by this Court in *Reitman.* The arguments advanced by official proponents of Proposition 14 sounded themes of "the right to sell or rent [the owner's] property as he chooses", assured by means of a measure that "will require the state to stay neutral," and urged the electorate to "vote for free-

dom." [11] The California court characterized such arguments as an invitation to racial discrimination thinly disguised "by the ingenuity of those who would seek to conceal it by subtleties and claims of neutrality," *Mulkey* v. *Reitman*, 50 Cal. Rptr. 881, 890, 413 P.2d 825 (1966). The official arguments in favor of Proposition 10 are strikingly similar. That measure's advocates advanced it as "neither for nor against public housing," but as a means to "restore to the citizens . . . the right to decide whether public housing is needed or wanted," and invoked the mantle of "the democratic process of government." Appendix at 50, 51, 52. Here as in the case of Proposition 14, this Court should look beyond the proponents' professed concern for "self-determination." The benefits of the alleged "self-determination" and "democratic process" embodied in Article 34 are available only to the majority, at the expense of a racial minority oppressed thereby.

The inference of discriminatory motivation is not, however, essential to showing that Article 34 sets up an unconstitutional scheme. As the Court below properly held, "Certainly, *Hunter* does not demand a showing of improper motivation." Appendix p. 177. Once Article 34's discriminatory effect is exposed, *Hunter* clearly controls and Article 34 must fall on equal protection grounds. Since measures designed to benefit the poor are of substantial and particular importance to racial minorities, obstacles to the construction of low-income housing particularly affect these minorities. As a consequence Article 34 detrimentally affects blacks and Mexican-Americans far more severely than whites.

---

[11] *Proposed Amendments to Constitution, Propositions and Proposed Laws, Together With Arguments.* (To be submitted to the Electors of the State of California at the General Election Tuesday, November 3, 1964.)

Article 34 by its terms discriminates on the basis of wealth. The court below found the evidence of the correlation between poverty and race so convincing that it entered summary judgment in part on the ground that wealth-based discrimination amounted to racial discrimination.[23]

Beyond the existence of the race-poverty correlation in Santa Clara and San Mateo Counties lies the pattern, widely noticed in recent years, of a similar correlation across the nation. The National Commission on Urban

---

[23] The District Court noted in its Opinion:

> "That minority groups comprise "the poor" is increasingly clear. In his affidavit, Mr. Franklin Lockfeld, Senior Planner for the Santa Clara County Planning Department stated: 'The low-income areas are closely related to the areas of concentration of minority residents and high income areas are closely related to the nearly all white sections of the community. . . . In 1960, only 5% of the units occupied by white-non-Mexican-Americans were in dilapidated or deteriorated condition, while 23% of the units occupied by Mexican-Americans and 20% of the units occupied by non-whites were in dilapidated or deteriorated condition. Minorities were thus over represented in the less than standard housing by greater than four to one, and occupied nearly one-third of the deteriorating and dilapidated housing in the County in 1960.'" App. p. 176 n. 2.

See also Affidavit of Dovie Ruth Wylie, Planner with the San Mateo County Planning Commission, expressing the informed opinion that there is a strong relationship between minority racial status and poverty in San Mateo County. App. p. 147-148. This view was uncontradicted below.

And see Declaration of Attorney Andrew H. Field, President of Fair Housing Council in San Mateo County: ". . . discrimination in housing in San Mateo County on the basis of race and ethnic background prevails throughout the housing industry. . . . The major method by which laws against open discrimination are evaded is by making most housing in San Mateo County economically beyond the means of most members of racial minority groups." App. p. 132-133.

Problems (Douglas Commission) summarized the situation in blunt terms:

> Most important, poverty families in substandard housing have a high correlation with race. If you are *poor* and *nonwhite* and *rent*, the chances are three out of four that you live in substandard housing. BUILDING THE AMERICAN CITY, Report of the National Commission on Urban Problems (1968), p. 10.[34]

Other studies have also concluded that the poor tend to be members of a racial minority, and vice versa. The National Advisory Commission on Civil Disorders (Kerner Commission) traced the same statistical correlations. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (Bantam Ed. 1968), p. 258. Federal courts have frequently taken note of this correlation.[35] In light of the wide recognition conferred upon the race-poverty correspondence, it would appear undeniable that measures

---

[34] The Commission also notes, ". . . the incidence of poverty is much higher among non-whites than among whites. In 1967, 41 per cent of the non-white population was poor, compared with 12% of the white population. Nonwhites thus constitute a far larger share of the poverty population (31%) than of the American population as a whole (12%). Moreover, the nonwhite proportion of the poverty population has been increasing, slowly but steadily." *Id.* p. 45.

[35] See, e.g., *Southern Alameda Spanish Speaking Organization* v. *City of Union City*, 424 F. 2d 291, 296: ". . . low-income families, who usually—if not always—are members of minority groups."

Hobson v. *Hansen*, 269 F. Supp. 401, aff'd sub nom. *Smuck* v. *Hobson*, 408 F. 2d 175: ". . . for a majority of District schools and school children race and economics are intertwined: when one talks of poverty or low income levels one inevitably talks mostly about the Negro." 269 F. Supp. at 454.

Ranjel v. *City of Lansing*, 293 F. Supp. 301 (W.D. Mich. 1968), rev'd on other grounds, 417 F. 2d 231 (6th Cir. 1969), found "a strong relationship between race and poverty," 293 F. Supp. at 303.

burdensome to the poor cut with special cruelty at blacks, Mexican-Americans, and other minorities. Article 34 is such a measure. We submit that the findings of the District Court, which was particularly familiar with these localities, of a racially discriminatory effect, were wholly proper.

B. *The Unequal Burden of Article 34 Is But One Aspect of a Pervasive Pattern of Racial Discrimination. This Pattern Perpetuates Residential Segregation and Discriminatorily Denies to Minorities a Wide Range of Opportunities.*

The racial effects of Article 34 with respect to low rent housing cannot be adequately considered apart from the broader patterns of racial discrimination in housing throughout California and across the nation. Article 34 is yet another example of the numerous ways in which blacks, Mexican-Americans, and other minority groups are denied equal opportunities in housing. Considered in this light, each discriminatory device (whether by design or otherwise) contributes significantly to the advancing evil which this lawsuit seeks in small part to redress: a society presently segregated and becoming ever more so.[26] More specifically, the effect of each discriminatory device for blacks and other minorities is to limit their mobility, to restrict their employment, educational and recreational opportunities, and to increase the cost and decrease the quality of the housing that remains open to them. *Each discriminatory device reinforces the effectiveness of every other discriminatory device.* Their impact on black and minority persons is cumulative and devastating.

---

[26] See REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (KERNER COMMISSION) (Bantam Ed. 1968), p. 1.

The racial prejudices that fueled the Proposition 14 (former Art, 1 §26, Calif. Const.) campaign[37] have left a bitter legacy in California and contributed to the "taxpayers' revolt" as regards public housing and other projects widely perceived as of special benefit to minorities. This "revolt" has made prior referendum approval for any such project extremely difficult to secure. (See Brief of Appellant Shaffer in No. 226 at 32, n. 20). Although the open bias exhibited while Proposition 14 was in effect[38] has largely ended, these discriminatory practices have again became covert. Blacks and other minorities in California consequently cannot compete on an equal basis for housing

---

[37] See Affidavits in Support of Motion for Summary Judgment, App. pp. 125-136.

[38] See, for example, Affidavit of Elaine Eisenberg, Member of San Mateo County Human Relations Commission, Appendix pp. 125-126:

"... After Proposition 14 was passed, ... attempts were made to find housing for black families.

"Common reactions from realtors and homeowners in the County was 'wouldn't they be happier with their own people,' 'I will show you where blacks can rent—in black ghetto areas,' 'I personally have no bias, but my neighbors would object,' 'my other tenants would move out,' or flat 'no's.' These discriminatory attitudes were and still are widespread throughout the County.

"The emphasis was always on finding houses and apartments to rent, because minority persons did not have enough money to buy homes. ...

"There has been no real change in attitude, even now with Proposition 14 off the books. ...

"When Proposition 14 was in effect, I received many threatening calls from persons who did not want equal opportunity in housing, and blacks received flat denials when they attempted to find houses; while this overt prejudice is not as apparent today, the underlying discrimination is. The practices are more subtle, and evasive, but the result is the same. ... *The desire to keep blacks with money out of white neighborhoods is even stronger when the blacks are persons of low income.* The housing problem today is critical." (Emphasis added)

This affidavit was uncontradicted.

in the private market. Cf. *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F.2d 920, 931. For many of them, low income public housing represents their only hope for decent, safe and sanitary housing.[19]

Nor is California unique for the pervasiveness of its housing discrimination. Across the land "real estate brokers and mortgage lenders are largely dedicated to the maintenance of segregated communities." *Reitman* v. *Mulkey*, *supra*, at 381 [Douglas, J., concurring]. Restrictive "neutral" zoning ordinances exclude minority groups. See, e.g., Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1968). Discriminatory private marketing practices, *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Lee* v. *Southern Home Sites Corp.*, —— F.2d —— (5th Cir. No. 28167, July 13, 1970) are widespread. Public agencies have been found to perpetuate segregation in administration of site location in public housing projects, *Gautreaux* v. *Chicago Housing Authority*, 296 F. Supp. 907 (N.D. Ill. 1969); *Hicks* v. *Weaver*, 302 F. Supp. 619 (E.D. La. 1969), in relocating displacees, *Norwalk CORE* v. *Norwalk Redevelopment Agency, supra;* and in misuse of regulatory procedures to prevent the construction of housing for blacks, *Kennedy Park Homes Association* v. *City of Lackawanna*, —— F. Supp. —— (W.D.N.Y. August 13, 1970) (expedited appeal pending, No. 35320, 2nd Cir.).

One final variety of devices that effectively perpetuate residential segregation attempts to conceal the discriminatory object behind a "democratic" referendum. See *Hunter* v. *Erickson*, *supra*, and *Reitman* v. *Mulkey*, *supra*, invalidating respectively the use and the product of such referenda. The lower court cases upholding the use of referenda,

[19] See Affidavit of William G. Weman, Executive Director of the Housing Authority of San Mateo County, Appendix pp. 122-124.

on which Appellant Shaffer heavily relies,[30] are all distinguishable. In *Ranjel* v. *City of Lansing*, 417 F.2d 321 (6th Cir. 1969), *cert. den.* 397 U.S. 980 (1970), the Sixth Circuit reversed a District Court decree enjoining such a referendum. The *Ranjel* situation differs fundamentally from the case at bar in that the proposed referendum there was a *subsequent* referendum in review of a legislative decision relating to a zoning change which would permit a low rent development. In *Southern Alameda Spanish Speaking Organization* v. *City of Union City*, 424 F.2d 291 (1970), the Ninth Circuit refused to nullify the result of a referendum cancelling a similar zoning change. But as in *Ranjel*, the referendum in question was of the ordinary type, *subsequent* to the legislative action reviewed. In a third case, *Spaulding* v. *Blair*, 403 F.2d 862 (1968), the Fourth Circuit refused to bar the submission of a state open housing enactment to the electorate for approval or rejection by referendum. Here again, the constitutional challenge was directed at a subsequent referendum, which was a mere repealer, not a bar to subsequent action, as in *Hunter, Reitman* and this case. The Fourth Circuit merely held that fair housing legislation was subject to the same review by referendum as all other state legislation, and was at pains to point out that the Maryland referendum had no *future* effect, 403 F. 2d at 864. The gravamen of appellee's position here is that Article 34 does have prospective effect, and that it applies an extraordinary requirement of prior review which does not (unlike the Maryland provision) apply generally to other legislation. In none of these three cases did the referendum force future housing measures to run a special gauntlet.

The cases just discussed do indicate how widely the referendum device has been used to exclude blacks and

[30] Brief of Appellant Shaffer in No. 226 at 58-60.

other minorities from predominantly white areas like San Mateo and Santa Clara Counties. To a great extent, then, measures like Article 34 which raise insuperable obstacles to low rent housing are in effect integral parts of a nationwide housing pattern (not everywhere intentionally contrived) that perpetuates residential segregation by race.

The analogy between the housing area and other important fields is instructive. There, too, legislation and constitutional litigation have all but eliminated the gross forms of open discrimination by race. But in those fields, as in housing, a whole range of devices superficially neutral but covertly discriminatory has been developed as a result of resourceful manipulation and the "accidental" workings of economic realities.[31]

---

[31] "Freedom of choice" school enrollment plans, *Green* v. *New Kent County School Board*, 391 U.S. 430 (1968); and dual school systems within "desegregated" districts, *Alexander* v. *Holmes*, 396 U.S. 19 (1969), are among those devices to resist school integration which have been recently struck down. In the voting rights area, grandfather clauses fell long ago, *Guinn* v. *United States*, 238 U.S. 347 (1915); but more recent and subtler devices never cease coming to light, including stringent and discriminatorily applied literacy tests, *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966); *Louisiana* v. *United States*, 380 U.S. 145 (1965), cf. Voting Rights Act of 1965 (42 U.S.C. §1973), Voting Rights Act Amendments of 1970 (42 U.S.C. §§1973b et seq.); poll tax and other property requirements, *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663 (1966), *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969), and political gerrymanders, *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960). Discriminatory denials of equal employment opportunity have been recognized and enjoined on statutory grounds where the denials resulted from the application of superficially neutral seniority systems, *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F. 2d 980 (5th Cir. 1969), *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968), or test and diploma requirements, *Arrington* v. *Massachusetts Bay Transportation Authority*, 306 F. Supp. 1355 (D. Mass. 1969), contra *Griggs* v. *Duke Power Co.*, 420 F. 2d 1225 (4th Cir. 1970), *cert. granted* 399 U.S. 926 (1970).

The relationship between housing and such opportunities as education, local voting rights, and employment is significant. Full enjoyment of equality in these crucial fields depends to a large extent on the availability of appropriate housing. This Court has previously invalidated racially discriminatory measures cloaked in the robes of democratic procedures and falsely "neutral" regulatory measures. The Court should in this case invalidate Article 34's discrimination against equal access to housing.

C. *The Racial Classification Inherent in Article 34 Cannot Be Constitutionally Justified. It Should Be Declared Invalid Under Appropriate Equal Protection Standards.*

A governmental classification which works to the disadvantage of a racial minority is subject to an effectively insuperable burden of justification. Because historically the central purpose of the Fourteenth Amendment is to protect racial minorities, *McLaughlin* v. *Florida,* 379 U.S. 184, 192 (1964), an official racial classification "even though enacted pursuant to a valid state interest, ... will be upheld only if it is *necessary,* and not merely rationally related to the accomplishment of a permissible state policy." *Id.* at 196 (emphasis added). This Court reiterated the principles governing such cases in invalidating Akron's very similar referendum requirement in *Hunter* v. *Erickson*:

> Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race, *Slaughter-House Cases,* 16 Wall 36, 71 (1873); *Strauder* v. *West Virginia,* 100 U.S. 339, 344-345 (1880); *McLaughlin* v. *Florida,* 379 U.S. 184, 192 (1964); *Loving* v. *Virginia,* 388 U.S. 1, 10 (1967), racial classifications are "constitutionally suspect," *Bolling* v. *Sharpe,* 347 U.S. 497, 499 (1954), and

> subject to the "most rigid scrutiny," *Korematsu* v. *United States*, 323 U.S. 214, 216 (1944). They "bear a far heavier burden of justification" than other classifications, *McLaughlin* v. *Florida*, 379 U.S. 184, 194 (1964). *Hunter* v. *Erickson*, 393 U.S. at 392.

In fact, once the racial classification has been found, no state action has ever been found to meet this extraordinary burden of justification.

Certainly California has presented no "compelling state interest" sufficient to justify the racial distinction worked by Article 34. Yet only such an interest could support the measure's constitutionality. *Shapiro* v. *Thompson*, 394 U.S. 618, 633-634 (concurring opinion of Justice Stewart) and 659 (dissenting opinion of Justice Harlan). The mere fact that the Article was adopted by popular referendum is no basis for finding it valid. "A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be," *Lucas* v. *Colorado General Assembly*, 377 U.S. 713, 736-737 (1964). *Lucas* struck down an attempt, by means of popular vote adopting a state constitutional amendment, to validate an apportionment scheme which would have violated federal constitutional standards. Surely the right to be free from state supported racial discrimination is no less fully protected than the right to an undiluted vote. Nor can Article 34 be justified because it submits all future questions to popular decision. As this Court stated in *Hunter* v. *Erickson*, "The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed." 393 U.S. at 392.

We have already presented our reasons for contending that California has no rational or reasonable interest in

the poverty-based scheme of Article 34.[32] We submit that these same reasons apply even more forcefully to show that there was no adequate justification for this scheme's racially discriminatory effects. In the absence of sufficient justification, Article 34 invidiously denies to minorities the Equal Protection of the laws guaranteed by the Fourteenth Amendment, and should be declared unconstitutional.

III.

By Effectively Denying to Negroes Access to Housing Equal to That Available to White Persons, Article 34 Imposes on Negroes a Badge and Incident of Slavery, and Constitutes A Denial of the Equal Right to Purchase, Lease and Hold Real Property, Mandated by 42 U.S.C. §1982.

On its face, Article 34 creates a classification on the basis of wealth. It places a burden on the availability of subsidized low rent housing—the only type of decent housing which many poor persons can afford—while placing no similar limitation on those whose income permits them to purchase housing in the private market.[33] Further, the close correlation between proverty and minority group status results in Article 34 having a racially discriminatory impact. This results in denying to Negroes equal opportunity to "lease . . . real . . . property," 42 U.S.C. §1982, and in "herd[ing] men into ghettos, . . . a relic of slavery," *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 442, in violation of the Thirteenth Amendment.

---

[32] See Part I, *supra*.

[33] This is true although private housing is often likewise subsidized, in a less obvious manner, by federal housing programs. See N. 9, *supra*.

We do not contend that section 1982 or the Thirteenth Amendment compel government to provide funds to poor Blacks to enable them to purchase any home which a white man, however wealthy, may purchase. However, given the fact that Congress has determined that it is necessary to provide low rent housing for the poor, 42 U.S.C. §§1401, 1441, which, as was found by the district court, "will be predominantly occupied by Negroes or other minority groups" App. p. 174, the question becomes whether the state can grant to the white majority the right to exclude such housing, and the persons who will live in it, from their communities, consistent with the Thirteenth Amendment.

In *Jones* v. *Alfred H. Mayer Co., supra,* this Court, declared:

> [T]his Court recognized long ago that, whatever else they may have encompassed, the badges and incidents of slavery—its "burdens and disabilities"—included restraints upon "those fundamental rights which are the essence of civil freedom, namely, the same right . . . to inherit, purchase, lease, sell and convey property as is enjoyed by white citizens." *Civil Rights Cases,* 109 U.S. 3, 22. Just as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery. 392 U.S. at 441-443 (footnote omitted).

Under the facade of encouraging local democracy, through referendum, Article 34 permits precisely what the opponents of the Thirteenth Amendment and the statutes enacted under it contended it would prohibit. It gives white

citizens, who constitute the majority of the communities here involved, the ability "to determine who [would] be members of [their] communit[ies] . . . ." [34]

It requires little investigation or understanding to see the vote against public low rent housing for what it is—a vote to keep blacks out of the community, or at least to keep them in the deteriorating ghetto housing to which the private housing market restricts them. The court below had no difficulty reaching the conclusion that the impact of Article 34 "falls upon minorities." App. p. 176, esp. N. 2. That housing discrimination limits the ability of poor blacks, and even those with sufficient income, to find decent housing, is clear in San Mateo and Santa Clara Counties,[35] as it is nationwide.[36]

A private housing developer is barred by Section 1982 from refusing to sell to Negroes because the majority of his white purchasers do not want Negro neighbors. *Jones* v. *Alfred H. Mayer Co., supra.* Here the majority speaks through the ballot, rather than by an agent, but its message is the same. If the Thirteenth Amendment and section 1982 do not extend to prohibit this, then their words are written in sand.

> At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.[37]

---

[34] Cong. Globe, 39th Cong., 1st Sess., 498; quoted in *Jones* v. *Alfred H. Mayer Co., supra* at 433.

[35] See NN. 23, 28, *supra.*

[36] See N. 24, *supra,* and accompanying text.

[37] *Id.* at 443.

CONCLUSION

The Court should hold that Article 34 of the California Constitution is unconstitutional as a denial of equal protection to the poor and to members of racial minorities, and as an encouragement of private discrimination and a denial of equal opportunity for Negroes to secure decent housing. The decision below should be affirmed.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
MICHAEL DAVIDSON
JEFFRY A. MINTZ
10 Columbus Circle, Suite 2030
New York, New York 10019

*Attorneys for the NAACP Legal Defense and Educational Fund, Inc. and the National Office for the Rights of the Indigent**

* In recent years, it has become common for law students and recent law school graduates to assist in public interest legal work, and the custom has developed of recognizing the efforts of those who are not yet admitted to the bar. In keeping with this custom, counsel for the *amici* acknowledge with appreciation the able assistance in the preparation of this brief of Morris J. Baller, Harvard Law School Class of 1970, a Reginald Heber Smith fellow assigned to the National Office for the Rights of the Indigent.